Supreme Court, U.S.
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No. 04-1084

IN THE SUPREME COURT OF THE UNITED STATES

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIÃO DO VEGETAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the district court abused its discretion by entering a preliminary injunction under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000) (RFRA) after finding that Petitioners failed to demonstrate any compelling interest in enforcing the Controlled Substances Act against Respondents' sacramental use of *hoasca*.

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Drug Abuse Control Amendments, 1970, Part 2: Hearings Before the Subcomm. On Public Health and Welfare of the H.Comm. On Interstate and Foreign Commerce, 91st Cong. 843 (1970) 19

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Michael Stokes Paulsen, *A RFRA Runs through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249 (1995) 40

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United Nations Conference for the Adoption of a Protocol on Psychotropic Substances, Official Records, vol. II, Vienna, Jan. 11– Feb. 19, 1971, Twenty Fifth Plenary Meeting, U.N. Doc. E/CONF. 58/7/Add. 1 (1973) 29

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OPINIONS BELOW

Petitioners (the government) omitted the district court's order denying the government's motion to stay the injunction. (Resp't Opp. App. 1–8.) That order is significant because it explains why the district court found that the Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S 175 (1971 Convention) does not apply to *hoasca*.

STATEMENT OF THE CASE

1. O Centro Espirita Beneficiente União do Vegetal (UDV)[1] and *hoasca*. UDV is a well-established, highly structured Christian Spiritist religion that originated in Brazil. (J.A. 49–72, 532, 723–26.) Central and essential to UDV's faith is receiving communion through *hoasca*, a sacramental tea made from two plants unique to the Amazon region, *psychotria viridis* and *banisteriopsis caapi*. (Pet. App. 180a–81a; J.A. 50, 60, 529, 561.) Members of UDV believe *hoasca* connects them to God. (J.A. 65, 463.) UDV regards the two plants as sacred, does not substitute other plants or materials as its sacrament, and considers use of *hoasca* outside religious ceremonies sacrilegious. (J.A. 63, 296, 317, 320.)

UDV's ceremonies also include recitation of church law, invocations, question-and-answer exchanges, and religious teachings. UDV counsels against alcohol use and forbids illegal drug use by its members. (J.A. 296; Pet. App. 127a.) Because UDV was founded in Brazil, most of its churches (*nucleos*) are there (J.A. 531), where it is highly respected. As a result of its charitable work, including the establishment of free clinics for the poor, the Brazilian government has accorded UDV the status of an organization of national benefit. (J.A. 709–10; Tr. 10/24/01 at 456–58.)

Approximately 130 UDV members live in the United States. (J.A. 56.) Its membership here is small because UDV does not proselytize. (*Id.*) A person must be eighteen years old to join. (J.A. 57.) Prospective members often wait as long as two years

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[1] We refer to both the church and its members as UDV.

before their first ceremony. (J.A. 56.)

UDV's sacramental *hoasca* is a tea that contains a small amount of naturally occurring dimethyltryptamine (DMT), a psychoactive substance listed in Schedule I of the Controlled Substances Act (CSA), 21 U.S.C.§ 812 (2000). (Pet. App. 197a.) "A typical dose of hoasca (200 mL) would contain 25 mg of DMT" (J.A. 343), which means that *hoasca* is twelve ten-thousandths of 1% DMT. A sixty-liter container of tea like the one government confiscated would contain one heaping teaspoon of DMT.[2] *Hoasca* does not cause UDV's members to hallucinate. (J.A. 877.) DMT is present in the healthy human brain and in common North American plants that, unlike the constituents of *hoasca*, lack religious significance to UDV. (J.A. 341, 383–88, 518–19, 522, 870; Tr. 10/24/01 at 601.) If, despite *hoasca*'s unpleasant and nauseating nature (J.A. 294), someone cared to make a "recreational" version, he could do so using common chemicals or roadside plants. (J.A. 318–20, 383–84, 518–19, 522–25, 734–35; Tr. 10/24/01 at 601.)

It is undisputed that during the seventeen years of UDV's existence here (J.A. 51), sacramental consumption of *hoasca* has caused no significant adverse health consequences, and no *hoasca* has been diverted to illicit use (J.A. 67, 456). Evidence also established it to be unlikely that UDV's *hoasca* would be diverted. (J.A. 68–70, 294–95, 319–22, 325–31, 739–43.) The only multidisciplinary research study of UDV members' ceremonial *hoasca* use concluded that "taking the hoasca within the context of the UDV ritual structure" was "a catalyst in their psychological and moral evolution" and resulted in "positive changes in their lives." (J.A. 93; *see* J.A. 94.)

2. District court proceedings. After the government seized UDV's *hoasca* and threatened its members with prosecution, UDV sued for injunctive relief under RFRA. The government

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[2] The government inaccurately describes *hoasca* as "DMT-based." (Brief for Petitioners (Br.) 5, 6, 17.) *Hoasca* is a water-based plant decoction containing a small amount of DMT and other alkaloids. (J.A. 342–43.)

conceded that UDV's religion is genuine, that its religious exercise is sincere, and that the government had substantially burdened UDV's exercise of religion. (Pet. App. 124a, 207a, 208a.) Under RFRA, these concessions shifted the burden to the government to prove it had a compelling interest in criminalizing UDV's sacramental use of *hoasca*. Assuming that burden, "[t]he Government asserted three compelling interests in prohibiting *hoasca*: protection of the health and safety of [UDV] members; potential for diversion from the church to recreational users; and compliance with the 1971 [Convention]." (*Id.* at 124a; 207a–08a.)

During the two-week preliminary injunction hearing, the parties presented extensive testimony and hundreds of documents. With respect to health effects, the evidence showed that over the course of a seven-year period of study, during which the UDV members who were studied in Brazil consumed *hoasca* approximately 325,000 times (J.A. 692), medical monitors identified only nine adverse health events possibly associated with *hoasca* (J.A. 192–264). Those incidents were "statistically insignificant" (J.A. 624, 700) and neither more severe nor more frequent than the average of similar incidents for non-adherents in the course of their everyday lives—the types of emotional reactions that people can experience from over-the-counter and prescription drugs (J.A. 610–13, 784), alcohol (J.A. 614, 799), peyote (J.A. 614), or even watching movies (J.A. 613, 798). The only study aimed at documenting the health effects of *hoasca* in a religious setting found no significant health concerns. (J.A. 75–101.) The government's expert could not testify that the evidence would permit him to consider UDV's *hoasca* use to be a health risk. (J.A. 850–51.) Another government expert testified that the use of *hoasca* within the UDV is *not* drug abuse. (J.A. 826.)

As to the risk of diversion, it is undisputed that during the seventeen years UDV has been in existence in this country (J.A. 51) no *hoasca* has been diverted to nonreligious use. J.A. 70, 545.) Further, the government failed to prove that

ceremonial use of *hoasca* by the 130 members of UDV would pose any greater risk of diversion than the ceremonial use of peyote, a Schedule I substance, extended to some 250,000 members of the Native American Church (NAC) since 1966, 21 C.F.R. § 1307.31 (2005); *see infra* n.10, and, more recently, to all members of federally recognized tribes, American Indian Religious Freedom Act Amendments of 1994 (AIRFA), 42 U.S.C. § 1996a(b)(1) (2000). (J.A. 831.) During the forty years of the peyote exemption, the DEA has not documented any incident where NAC's peyote was diverted to illicit use. (J.A. 509, 917.)

In deciding UDV's motion for a preliminary injunction, the district court adhered to RFRA, identifying its task as determining whether the government had demonstrated a compelling interest in suppressing UDV's use of *hoasca* and whether the elements for preliminary relief were met. (Pet. App. 210a, 212a.) The court took due regard of Congress's decision to list DMT on Schedule I, but held that, given RFRA's command that the government's compelling interests be evaluated in light of the *particular* religious exercise under scrutiny, the fact that Congress made general findings as to the risks of Schedule I drugs was not dispositive. (*Id.* at 210a–12a.) After analyzing the evidence, the district court found:

> The Government has not shown that applying the CSA's prohibition on DMT to the UDV's use of hoasca furthers a compelling interest. This Court cannot find, based on the evidence presented by the parties, that the Government has proven that hoasca poses a serious health risk to the members of the UDV who drink the tea in a ceremonial setting. Further, the Government has not shown that permitting members of the UDV to consume hoasca would lead to significant diversion of the substance to non-religious use.

(*Id.* at 212a–13a) (footnote omitted). The district court also found that the 1971 Convention "does not apply to the hoasca tea used by the UDV." (*Id.* at 242a.) It did not reach the least

restrictive means prong of RFRA because it found the government had not proved a compelling interest. (*Id.* at 243a.)

In its preliminary injunction, the court held that UDV had demonstrated a substantial likelihood of success on the merits, irreparable harm, that the threatened injury to UDV outweighed any injury to the government, and that the public interest in protecting religious freedom favored UDV. (*Id.* at 247–48a.) The court enjoined the government from treating UDV's importation, possession, and religious use of *hoasca* as criminal. (*Id.* at 248a.) At the government's insistence (J.A. 982–87), the injunction requires UDV to comply with DEA import, reporting, registration, and storage regulations (Pet. App. 249a–59a).

3. The government's appeals. The evidence fully supports the district court's factual determination that the government failed to prove a compelling interest in banning UDV's sacramental use of *hoasca*. (*Id.* at 213a–36a.) The government has never appealed those findings as clearly erroneous under Fed. R. Civ. P. 52(a). (Pet. App. 93a.) Nor has the government identified the use of an erroneous legal standard under RFRA. The court of appeals panel held that the evidence supported the district court's findings and that it had properly applied RFRA. (*Id.* at 141a–42a, 145a.)

The court of appeals granted rehearing en banc to determine whether to continue to apply a heightened burden for preliminary injunctions that "disturb[] the status quo" and, if so, whether UDV met that burden. (*Id.* at 2a–3a.) By a one-judge majority, the court of appeals held that an application for a preliminary injunction that will alter the status quo "must be more closely scrutinized." (*Id.* at 4a.) By a vote of eight to five, the en banc court affirmed the district court. (*Id.* at 5a.)

4. The government's misleading assertions. In this appeal, the government misstates the facts about UDV and its sacramental use of *hoasca*. This is an attempt to relitigate factual issues the district court resolved against it and the court of appeals twice affirmed.

As to health risks, the government distorts the record on at least eight important points. First, the government claims "the Brazilian UDV documented twenty-four psychotic incidents during ceremonial hoasca usage." (Br. 34 & n.19.) But the evidence was that only nine such incidents occurred either during or after a ceremony, and *hoasca* was only arguably involved. (J.A. 192–264.) *All* involved people had preexisting mental health problems. (*Id.*) A number were "coincidental" and, in any event, the incidents were "statistically insignificant" relative to the more than 325,000 occasions monitored. (J.A. 624, 692, 700–01). Also, physicians used "psychotic event" to describe a transitory state that is "different from . . . psychosis." (J.A. 714.) The government also ignores that the incidents were types that can be triggered by alcohol, peyote, prescription drugs or even movies.[3]

Second, the government claims that *hoasca* caused "cardiac irregularities." (Br. 6, 33.) But the testimony described "cardiac changes" of the type found "in a normal population," (J.A. 287–88), and the government's expert testified that the information was insufficient to make any health judgment (J.A. 797, 851–52). In addition, the statistics the government relies on are from a study its expert concluded was "inadequate to support any meaningful statement about the health effect of *hoasca*" (J.A. 134) and that one "irregularity" was a slow heartbeat, common among young athletes (J.A. 721).

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[3] The district court, which carefully considered all the "psychosis" evidence (Pet. App. 223a–26a), did not adopt the government's distorted view of it (Br. 33 n.18). In one incident, the government attributes to *hoasca* a state of mental confusion during which a person manifested "aggressive reactions" and "began 'eating lawn grass' and drinking 'swamp water.'" (*Id.*) This occurred ten days after drinking *hoasca*, and *immediately after* drinking "nightshade tea," also known as belladonna, which the DEA's Microgram Bulletin, vol. XXXVII, no. 4, Apr. 2004, states "has resulted in numerous deaths and injuries, including self-mutilations from extreme psychotic incidents." The government's version of other events is equally incomplete and misleading. (*See* J.A. 195–198; 228, 230–32, 243–46.)

Third, the government states that UDV's use of *hoasca* should be considered unsafe because some members of UDV were former alcoholics or had abused alcohol or drugs (Br. 34 n.19), but omits that UDV, like NAC, has succeeded in eliminating drugs and alcohol from the lives of those members who had previously abused them (J.A. 67, 93–94, 296, 496).

Fourth, the government cites a letter written by a UDV leader cautioning that "ayahuasca" use could be dangerous.[4] (Br. 33.) However, the letter described "ayahuasca analogs" that could be abused by non-UDV members outside of the formal religious context, not UDV's sacramental use of *hoasca*. (J.A. 177–80, 596.)

Fifth, the government asserts that UDV "administer[s] [*hoasca*] to children" (Br. 32) but omits that this is on very rare occasions, only within the context of religious ritual, in very small amounts and with the evaluation and consent of both their parents and the trained religious leadership (J.A. 62, 458–60). The government also omits that it has for decades accommodated the unregulated use of Schedule I peyote and mescaline by the children of members of NAC. (J.A. 539, 602, 936.) In addition, although the government insisted that the preliminary injunction require UDV to comply with federal regulations and provide detailed health warnings (none of which it imposes on NAC) the government did not ask for any restrictions on participation by children in UDV ceremonies. (Pet. App. 247a–60a.)

Sixth, the government argues that Congress has found that hallucinogens can sometimes cause suicide (Br. 15, n.6), but omits its own expert's testimony that the government had no reason to believe UDV's sacramental use of *hoasca* would have that effect (Tr. 10/29/01 at 962).

Seventh, the government asserts that "DMT can precipitate

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[4] "The term 'hoasca' refers to the specific tea preparation used in the UDV. 'Ayahuasca' is a broader term that refers to a category of South American teas containing DMT and beta-carbolines." (Pet. App. 180a–81a n.2.)

psychoses, cause prolonged dissociative states, and can catalyze latent anxiety disorders" (Br. 15), citing (1) the report of its expert, who draws inferences about the possible health effects of *hoasca* based on what he purports to know about other substances (J.A. 125–27), but acknowledges that "[w]e do not have the data to address to what degree any of these effects are relevant to ayahuasca" (J.A. 127), and (2) the testimony of UDV's expert, who identified adverse reactions associated with smoking and injecting synthetic DMT, but explained that "[t]he likelihood of such pathologies occurring following oral ingestion of hoasca is . . . *extremely low*" (J.A. 297) (emphasis added). The government also omits that oral ingestion "produces a less intense, more manageable, and inherently psychologically safer" experience. (Pet. App. 219a.)

Eighth, the government claims that UDV concedes that "hoasca poses a significant risk of dangerous adverse drug interactions." (Br. 34.) In fact, UDV presented evidence to prove that the health risk is *insignificant*. (Pet. App. 222a–23a.) Both sides' experts agreed that there was a possibility of adverse interaction between certain prescription drugs and the "MAO inhibitors" present in *hoasca*. (J.A. 294–95.) The government's expert testified, however, that he would be more concerned by a person drinking grapefruit juice while taking a contraindicated drug than by a UDV member taking *hoasca* in a UDV religious service. (Pet. App. 223a; J.A. 831–32; *see also* J.A. 308, 883.)

The government also distorts the record regarding the risk of diversion in three important respects. First, the government contends that there has been a resurgence in abuse of hallucinogens, including DMT.[5] (Br. 35–36.) But the

[5] In support of its diversion argument, the government makes several new factual assertions without record evidence, including that efforts to combat drug trafficking will suffer if UDV is permitted a religiousexemption (Br. 8); that an exemption for UDV will result in a new drug taking hold in the "drug cultur" (Br. 9); that UDV's sacramental use will "put[] a new drug delivery system for a Schedule I substance on American soil" (Br. 11); that the characteristics of *hoasca* that make it "so dangerous" also "render [it] attractive to drug users"(Br. 19); that the public will assume that if *hoasca* is safe in the religious context, it is not harmful (Br. 23); that DMT is abused on "Wall Street" and that there is no legitimate distinction can be made between UDV's sacramental use of *hoasca* and a "businessman's" recreational use of synthetic DMT (Br. 40). Not a single one of these statements has any evidentiary support.

government fails to mention that its DEA agent witness testified that he was not aware of any evidence of an increase in the use of DMT. (J.A. 516.) In fact, the most recent reported state or federal case involving convictions relating to DMT is twenty-seven years old, and there have been only five such cases over the past thirty years.[6]

Second, the government cites increasing interest in illegal use of *hoasca* and DMT, which it documents with non-record hearsay evidence. (Br. 37 & n.24.) But the government's own DEA expert testified that there is just as much interest in peyote, yet neither Congress nor the DEA has documented a single case of peyote diversion. (J.A. 321–22, 899, 917.)

Third, contrary to the government's alarmist statements, the evidence established that "[n]o cases involving the diversion of [psychotropic substances listed in Schedule I of the 1971 Convention] from licit international trade have *ever* been reported" (J.A. 740) (emphasis added). Of the hundreds of thousands of kilograms of legal narcotics imported into the United States every year, virtually none of it is diverted to illicit use. (J.A. 739–45.)

5. The preliminary injunction in operation. After this Court denied the government's motion to stay the injunction (Order, 12/10/04), UDV resumed its importation and religious use of *hoasca*. As UDV will prove at trial, during the past nine

[6] *See United States v. Ling*, 581 F.2d 1118 (4th Cir. 1978); *United States v. Green*, 548 F.2d 1261 (6th Cir. 1977); *United States v. Noreikis*, 481 F.2d 1177 (7th Cir. 1973) *vacated* 415 U.S. 904 (1974); *United States v. Moore*, 452 F.2d 569 (6th Cir. 1971); *Mason v. State*, 256 A.2d 773 (Md. Ct. Spec. App. 1969).

months, no *hoasca* has been diverted for illicit use, no person has suffered any adverse health effects as a result of drinking the sacramental tea during UDV ceremonies, and no party to the 1971 Convention has complained about the United States permitting UDV to import, possess, and consume *hoasca*.

SUMMARY OF ARGUMENT

The government conceded below that UDV is a genuine religion, that its use of *hoasca* is a sincere exercise of religion, and that the government has substantially burdened UDV's exercise of religion. Under RFRA, this shifted the burden to the government to prove it has a compelling interest in suppressing UDV's sacramental use of *hoasca*. During the two-week hearing, evidence showed that UDV's sacramental use of *hoasca* causes no harm and has resulted in no diversion, and that there is no relevant difference between UDV's sacramental use of *hoasca* and NAC's sacramental use of peyote, which the government agrees has never created a health or diversion problem. The government did not attempt to meet its burden to demonstrate least restrictive means. The district court granted a preliminary injunction after finding that the government had failed to demonstrate any compelling interest. The court of appeals affirmed, holding that the record supported the district court's findings. Under the "two-court rule," the government has no basis to challenge them.

Instead of appealing the district court's findings and explaining why they should be considered clearly erroneous, the government attacks them by innuendo, filling its brief with misleading, out-of-context snippets of evidence that the district court rejected, along with factual assertions and alarmism supported either by non-record documents or nothing at all.

The government's principal arguments are that even under RFRA courts should treat as factually conclusive a congressional decision to schedule a controlled substance and that courts are unable to evaluate claims for religious exemption from the CSA. These arguments directly conflict

with RFRA. First, RFRA applies to all federal law, and Congress understood that RFRA would apply to the religious use of controlled substances. Second, RFRA's text and legislative history evince Congress's mandate that courts look behind a law's general application, and behind general legislative findings to determine if the need to apply the law to a particular exercise of religion is actually compelling. Furthermore, this Court unanimously held that case-by-case evaluation of statutory free exercise claims is an appropriate task for the courts. *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2123 & n.24 (2005). Finally, the government's successful accommodation of the sacramental use of peyote, also a Schedule I substance, belies its claim that such substances require a categorical ban, even for religious use.

The government also claims it has a compelling interest in the uniform application of the CSA. The government first raised this argument on appeal, having failed to prove any compelling interest it asserted in the district court. Neither the district court nor UDV had any opportunity to address the uniform application theory below, and no record evidence supports it. The government may pursue this theory at trial, where it can attempt to prove why, notwithstanding the peyote exemption, uniform application of the CSA is critical to its enforcement efforts. If the government can succeed based solely on an assertion in an appellate brief, RFRA's requirement of individualized proof will be fatally undercut.

As for the government's argument that it should have won below because the district court found the evidence to be "in equipoise," the district court found, and the court of appeals agreed, that the government failed to prove any compelling interest in suppressing UDV's sincere, sacramental use of *hoasca*. Furthermore, this Court and lower courts have consistently held that the party with the burden of proof—under RFRA, the government—must lose when the evidence is in equipoise. Finally, when reviewing a preliminary injunction in a "close" case, this Court "should uphold the injunction and

remand for trial on the merits." *Ashcroft v. ACLU,* 124 S. Ct. 2783, 2791 (2004).

The government's treaty argument fails because the text of the 1971 Convention, the United Nations *Commentary on the Convention on Psychotropic Substances*, U.N. Doc. E/CN.7/589 (1976) (*1971 Commentary*), authoritative interpretations, and the text of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 493 (1988 Convention) which is read *in pari materia* with the 1971 Convention, *see Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, at 22, U.N. Doc E/CN.7/590 (1988) (*1988 Commentary*) establish that it does not apply to *hoasca*. Even if it did apply, the 1971 Convention contains a provision that accommodates domestic law, including RFRA. In addition, other treaties require the United States to accommodate religious practices, including UDV's. Even if the Convention were to apply to UDV's religious use of *hoasca*, the government has not demonstrated an individualized compelling interest in enforcing it against UDV. Finally, the government objected to any evidence regarding the Convention, informing the district court that this was "for another day." (J.A. 769). The government may not change its position now.

In addition to failing to prove a compelling interest in suppressing UDV's sacramental use of *hoasca*, the government adduced no evidence that a categorical ban on anything containing Schedule I controlled substances, including *hoasca*, is the least restrictive means of furthering any of its interests. In granting the preliminary injunction, the district court merely applied RFRA and well-accepted standards governing preliminary injunctions.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ISSUING THE PRELIMINARY INJUNCTION

I. THE LOWER COURTS APPLIED RFRA CORRECTLY.

Congress passed RFRA in 1993 in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882 (1990), which held that the Free Exercise Clause does not protect the exercise of religion from neutral, generally applicable laws. Congress found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that the government "should not substantially burden religious exercise without compelling justification." § 2000bb(a)(2), (4). In passing RFRA, Congress directed courts to apply the compelling interest test "in *all* cases where free exercise of religion is substantially burdened." § 2000bb(b)(1) (emphasis added). Congress provided the sincere religious adherent with access to the courts to obtain "appropriate relief" from any government action that substantially burdens religious practice, § 2000bb-1(c), unless the government "demonstrates" that its "application of the burden *to the person*" is the least restrictive means of furthering a compelling interest, § 2000bb-1(b) (emphasis added). "[D]emonstrates" means "meets the burdens of going forward with the evidence and of persuasion." § 2000bb-2(3).

By mandating strict scrutiny, Congress left no doubt that "[w]here fundamental claims of religious freedom are at stake," courts cannot rely upon "sweeping claim[s]" as evidence; even when the claims have "admitted validity in the generality of cases, [courts] must searchingly examine the interests that the [government] seeks to promote" and "the impediment to those objectives that would flow from recognizing" an exemption. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *see also*

Republican Party v. White, 536 U.S. 765, 780–81 (2002), (rejecting Virginia's "assertion and conjecture . . . that without criminal sanctions the objectives of the statutory scheme would be seriously undermined") (quoting *Landmark Comm'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978)); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 719 (1981) (rejecting conclusory rationale for refusing religious exemption for lack of "evidence in the record"); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ("possibility" of abuses extending from exemption is insufficient when "there is no proof whatever to warrant such fears" appearing in record).

RFRA's legislative history confirms what its text and stated purpose make clear. Courts must engage in a fact-specific analysis of RFRA claims to determine whether the government has proved that imposing a burden on the *particular* religious exercise by the *particular* adherent is the least restrictive means of furthering a compelling interest:

> Making a religious practice a crime is a substantial burden on religious freedom. It forces a person to choose between abandoning religious principles or facing prosecution. Before we permit such a burden on religious freedom to stand, the Court should engage in a case-by-case analysis of such restrictions to determine if the Government's prohibition is justified. The legislation I hope to introduce will require such a case-by-case analysis.

136 Cong. Rec. S17330 (daily ed. Oct. 26, 1990) (statement of Sen. Biden for himself and Sens. Hatch, Kennedy, Specter, Inouye, Lieberman, Metzenbaum, and Moynihan).

Congress clearly intended courts to apply RFRA to religious use of controlled substances. First, RFRA applies to "all Federal law, and the implementation of that law." § 2000bb-3(a). Second, Congress passed RFRA in response to *Smith*, which involved the religious use of a Schedule I substance. Third, RFRA's legislative history explicitly refers to its applicability to religious use of a Schedule I substance:

> [T]his bill would not mandate that [the government] permit the ceremonial use of peyote, but *it would subject any such prohibition to the aforesaid balancing test*. The courts would then determine whether the [government] had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the [government] had chosen the least restrictive alternative required to advance that interest. *It is worth emphasizing that . . . this bill is applicable to all Americans*.

H.R. Rep. No. 103-88, at 7 (1993) (emphases added). RFRA's codification of strict scrutiny, requirement that courts engage in fact-specific analysis, and applicability to all federal law reflect Congress's view that free exercise of religion is of paramount importance: "Many of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." S. Rep. No. 103-111, at 4 (1993).

By requiring the government to satisfy strict scrutiny, the lower courts adhered to the first canon of statutory construction: "[B]egin with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (internal quotation marks and quoted authority omitted).

II. The Government Did Not Prove That Prohibiting UDV's Use Of *Hoasca* Is The Least Restrictive Means Of Furthering Any Compelling Interest.

A. UDV's sacramental use of hoasca *does not threaten the health and safety of its members and will not lead to diversion for illicit use.*

Instead of directly challenging the district court's factual findings (Pet. App. 212a–13a) or the court of appeals's opinion

affirming those findings (*id.* at 142a, 145a), which are entitled to the greatest deference at this juncture under the two-court rule, *see United States v. Ceccolini*, 435 U.S. 268, 273 (1978), the government advances four fatally flawed arguments.

1. The Court should not revisit the district court's factual findings.

Without admitting it, the government attacks the district court's fact findings by asking this Court to accept that *hoasca* does, *in fact*, present a health risk to UDV's members, and does, *in fact*, present a risk of diversion. As explained *supra* pp. 5–9, the government does so by selecting its favorite tidbits from the evidence below, omitting all of the contrary evidence, and making factual assertions devoid of evidentiary support. The government's "one-sided versions of events and refusals to confront evidence in support of the district court's findings" cannot justify reversal. *Addamax Corp. v. Open Software Found.*, 152 F.3d 48, 54 (1st Cir. 1998); *see also Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 895 F.2d 1403, 1405 (Fed. Cir. 1990) ("[T]he court's patience is sorely tried by an inability or refusal of an appellant to understand the purpose and rules governing the appellate process. Having utterly failed to prove its case . . . at trial, [appellant] attempts to retry that case here, asking this court . . . to accept its one-sided version of the evidence and its selected snippets of testimony.").

2. RFRA requires examination of the particular religious practice, not deference to broad congressional classifications.

The government argues that because this case involves the use of a Schedule I controlled substance, the lower courts should not have held the government to its burden of proof under RFRA and that this Court should not concern itself with the evidentiary record except where it favors the government. Contrary to the plain language, legislative history, and purpose of RFRA, the government faults the lower courts for engaging

in fact-specific analyses rather than deferring to Congress's supposed findings regarding the dangerousness and potential for diversion of all Schedule I substances. (Br. 29–32.)

The government's arguments rest on a fundamental misunderstanding of this Court's decisions and of RFRA. In the teeth of RFRA's mandate that courts evaluate each claim on its merits, the government asks this Court to import its entirely unrelated holdings in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997) and conclude that the lower courts erred by failing to defer to Congress's "predictive judgments." (Br. 29.) The *Turner* cases hold that "[*i*]*n reviewing the constitutionality of a statute*, courts must accord substantial deference to the predictive judgments of Congress." 520 U.S. at 195 (internal quotation marks omitted; emphasis added). Since UDV does not challenge the constitutionality of the CSA and since the Court did not apply strict scrutiny in the *Turner* cases, they are inapposite.

UDV asserts its statutory right under RFRA to require the government to prove a compelling interest in proscribing UDV's religious use of *hoasca*. RFRA's premise is that a religious adherent's beliefs may require conduct prohibited by a generally applicable law, and that the prohibition will be based on a general congressional determination that the conduct contravenes a public policy reflected in the law. Nevertheless, under RFRA, Congress entrusted courts with the responsibility of evaluating whether it is essential to apply the policy to a particular exercise of religion by a particular person or group. The deference to "predictive judgments" described in the *Turner* cases cannot assist courts with fact-specific assessments. *See Smith*, 494 U.S. at 899 (O'Connor, J., concurring in the judgment) (explaining that "[e]ven if, as an empirical matter, a government's criminal laws might *usually* serve a compelling interest in health, safety, or public order," strict scrutiny "at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim").

As Judge Seymour wrote for a majority of the *en banc* court:

> [T]his case is not about enjoining enforcement of the criminal laws against the use and importation of street drugs. Rather, it is about importing and using small quantities of a controlled substance in the structured atmosphere of a bona fide religious ceremony. . . . In this context, what must be assessed is not the more general harm which would arise if the government were enjoined from prosecuting the importation and sale of street drugs, but rather the harm resulting from a temporary injunction against prohibiting the controlled use of hoasca by the UDV in its religious ceremonies . . .

(Pet. App. 72a–73a.) Judge McConnell agreed that RFRA requires a "searching examination" of the evidence because "Congress's general conclusion that DMT is dangerous in the abstract does not establish that the government has a compelling interest in prohibiting the consumption of hoasca under the conditions presented in this case." (*Id.* at 95a, 99a.) Even Judge Murphy, who wrote the principal dissent, recognized elsewhere that "under RFRA a court does not consider the . . . regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the . . . regulation *to the individual claimant*." *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001) (emphasis added). Any other understanding of RFRA would effectively nullify the statute, since, as Judge McConnell explained, if the "burden of proof could be satisfied by citing congressional finding[s] in the preambles to statutes, without additional evidence, RFRA challenges would rarely succeed," because "congressional findings invariably tout the importance of the laws to which they are appended." (Pet. App. 98a.)

Nor did the district court fail to "pay[] any discernable heed to Congress's findings" (Br. 31), the district court reasoned that it could not "ignore that the legislative branch of the government elected to place materials containing DMT in

Schedule I of the CSA," but that, "[u]nder RFRA, Congress mandated that a court may not limit its inquiry to general observations about the operation of a statute." (Pet. App. 210a, 211a.)

Moreover, although the government repeatedly refers to Congress's "findings" regarding DMT, Congress never specifically found that DMT had a "high potential for abuse."[7] Because DMT had no accepted medical use and some potential for abuse, it automatically fell into Schedule I, which is essentially a catchall:

> [W]hen it comes to a drug that is currently listed in Schedule I, if it is undisputed that such drug has no currently accepted medical use. . . and a lack of accepted safety for use under medical supervision, and it is further undisputed that the drug has at least some potential for abuse sufficient to warrant control under the CSA the drug must remain in schedule I.

Notice of Denial of Petition, 66 Fed. Reg. 20,038, 20,039 (Apr. 18, 2001) (denying petition to reschedule marijuana); (*see* J.A. 314–16, 336, 731–34). Nor did Congress make any findings about whether UDV's sacramental use of *hoasca* posed any

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[7] The only findings on DMT were entered at two 1970 hearings before House committees and referred generally to hallucinogens as a class, not to DMT. *See Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H.R. 17463 and H.R. 13742 Before the H. Comm. on Ways and Means*, 91st Cong. 305 (1970); *Drug Abuse Control Amendments, 1970, Part 2: Hearings Before the Subcomm. on Public Health and Welfare of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 843 (1970) (Hearing on Drug Abuse Control). The only specific reference to DMT's effects was that it may cause "increased heart rate and blood pressure." Hearing on Drug Abuse Control at 844. Positive effects of hallucinogens can include "a meaningful philosophic-mystic experience" and "altered motivation and life-style" that may be positive rather than negative. *Id.* Furthermore, because "[s]ympathetic support" is generally sufficient to control negative symptoms, use within a supportive religious context is likely to decrease the risk of detrimental effects. *Id.*

risks that would justify prohibiting UDV's members from receiving communion.

> If Congress or the executive branch had investigated the religious use of *hoasca* and had come to an informed conclusion that the health risks or possibility of diversion are sufficient to outweigh free exercise concerns in this case, that conclusion would be entitled to great weight. But neither branch has done that. . . . [G]eneralized statements are of very limited utility in evaluating the specific dangers of *this* substance under *these* circumstances, because the dangers associated with a substance may vary considerably from context to context.

(Pet. App. 100a) (McConnell, J., concurring).[8]

The undisputed success of the longstanding exemption for religious use of peyote by the 250,000 members of NAC, 21 C.F.R. § 1307.31, which Congress has extended to all members of every Indian tribe, 42 U.S.C. § 1996a(b)(1), belies the claim that Congress has determined that it is necessary to "categorical[ly] prohibit[]" the possession and use of *every* Schedule I controlled substance in *every* context (Br. 15) and is fatal to the government's sweeping justification for denying a much narrower exemption for UDV's sacramental use of *hoasca*. When it enacted AIRFA, Congress found that "[m]edical evidence . . . clearly demonstrates peyote is *not injurious* to the Indian religious user, and, in fact, is *often helpful* in controlling alcoholism and alcohol abuse among Indian people."[9] H.R. Rep. No. 103-675, at 3 (1994) (emphases

[8] Whether a more specific congressional finding would be entitled to deference is debatable since RFRA's proof requirements "apply to all Federal law," § 2000bb-3(a), and since Congress has required that if any statute is to be beyond the reach of RFRA, the statute must say so and mention RFRA by name, *see* § 2000bb-3(b).

[9] The government contends that RFRA must not protect the religious use of controlled substances because if it did, Congress would not have had to enact AIRFA to protect sacramental use of peyote. (Br. 28.) However, as the

added). One of the government's experts agreed that Congress's findings regarding peyote were "valid" based on the available evidence (J.A. 821–22) and that there was a factual basis for finding that "[p]eyote . . . is beneficial, comforting, inspiring and appears to be spiritually nourishing." (J.A. 815) (internal quotation marks omitted). Despite evidence that the mescaline in peyote and the DMT in *hoasca* are chemically similar (J.A. 816) and that the religious use of *hoasca* is not harmful and has allowed members of UDV to "discontinu[e] alcohol, cigarettes, and other drugs of abuse" and gain "a sense of meaning and coherence [in] their lives" (J.A. 93), the government refuses to recognize that it can safely permit UDV's ceremonial use of *hoasca*.

In addition, although the government has permitted NAC to distribute, possess, and use peyote for nearly four decades,[10] the government insists that it should not have to prove why creating a religious exemption that would allow the 130 members of UDV to lawfully use *hoasca* in religious ceremonies poses unacceptable risks. Similarities between NAC and UDV and their respective sacraments reveal that the government's contention is wrong. (J.A. 538–44, 816, 823–25.) Both sacraments contain Schedule I controlled substances. Because UDV and NAC take their sacraments only during religious services and consider sacrilegious any other use, both

panel found, "[f]ederal protection of peyote existed well before RFRA; the statute protected the Native American Church only from state prosecution." (Pet. App. 152a.) Congress enacted AIRFA to ensure that American Indians have the right to use peyote in religious ceremonies without state interference, and without federal interference, regardless of how courts interpret RFRA.

[10] The government contends that the federal peyote exemption is " *sui generis*" and that the exemption only protects the sacramental use of peyote by Indians. (Br. 27.) But the NAC has always had non-Indian members (J.A. 406–49, 502), and the federal regulatory exemption has protected NAC since 1966. *See* 21 C.F.R. § 1307.31, *originally promulgated as* 21 C.F.R. § 166.3 (1966); (*see also* J.A. 485–87).

groups "reinforce[] the [CSA's] prohibition." *Olsen v. DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989) (R.B. Ginsburg, J.); (J.A. 63). Moreover, unlike marijuana and "other widely used controlled substance[s]," peyote and *hoasca* are not in high demand among illicit drug users. *Olsen*, 878 F.2d at 1463. The history of both religions' use of their sacraments rebuts the government's arguments, and "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). Nor should the government prevail by insisting that it can only stave off dire consequences by entangling itself with UDV. As Judge McConnell observed:

> The relatively unproblematic state of peyote regulation and use belies the Government's claimed need for constant official supervision of [UDV's] *hoasca* consumption. The DEA does not closely monitor the Native American Church's peyote use, guard the mountains in Texas on which peyote is grown, nor monitor the distribution of peyote outside of Texas. Since its legalization for use by the Native American Church in 1966, peyote remains extremely low on the list of abused substances. While thus far the relationship between Uniao do Vegetal and the DEA has been adversarial, allowing an exemption for religious use might lead to a cooperative relationship similar to the one between the government and the Native American Church.

(Pet. App. 152a.)[11]

Below, UDV also asserted equal protection and free exercise claims that the district court dismissed pursuant to this Court's holding in *Morton v. Mancari*, 417 U.S. 535 (1974), and *Smith*, respectively. (J.A. 954–81.) Although UDV contends that the

[11] Judge McConnell also correctly observed that those regulatory provisions are only "in the injunction because the government demanded the UDV be subject to some form of regulatory control in the course of importing and distributing *hoasca*." (Pet. App. 67a; *see also* J.A. 982–87.) UDV would be content with the low level of control that the government imposes on peyote. (*See* J.A. 905–07.) The record is devoid of evidence that more intrusive regulation of UDV is necessary.

district court erred in doing so, those issues are not now before this Court. But whether defendants' disparate treatment of NAC and UDV is a basis for a constitutional claim, or merely is evidence that the government lacks a compelling interest in enforcing the CSA against UDV's use, there can be little doubt of its importance in this litigation.

> [The Supreme Court has] suggested that legislation which exempts the sacramental use of peyote from generally applicable drug laws is not only permissible, but desirable, without any suggestion that some 'up front' legislative guarantee of equal treatment for sacramental substances used by other sects must be provided. The record is clear that the necessary guarantee can and will be provided, after the fact, *by the courts*.

Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 747 (1994) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.) (citations omitted; emphasis in original).

3. Evidentiary equipoise does not satisfy the government's burden.

In the district court, the government had to show only that it was more likely than not to win on its affirmative defenses. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (preponderance of evidence standard generally applicable in civil actions). The district court found that the government was unable to do so with respect to its asserted interests (1) in protecting the health of UDV members, because the evidence was in "equipoise" (Pet. App. at 227a), and (2) in preventing risk of diversion of *hoasca* to nonreligious use because the evidence was "virtually balanced" and "may even tip the scale slightly in favor of the Plaintiffs' position" (*id.* at 236a & n.12). As Judge McConnell explained, "RFRA makes it clear that only demonstrated interests of a compelling nature are sufficient to justify substantial burdens on religious exercise. Mere 'equipoise' with respect to not-necessarily-compelling governmental interests is not enough." (*Id.* at 110a.)

The government tacitly acknowledges that this Court should

not reevaluate the evidence since it does not argue that the district court's findings were clearly erroneous.[12] Instead, the government suggests that evidentiary equipoise should have been a legally adequate basis to reverse the district court's findings. That is wrong. When "the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998) (when the evidence is in "equipoise," the party bearing the burden of proof loses).

The government failed to carry its burden, and non-existent Congressional findings are not a substitute. Even if this case could be considered "close," the Court "should uphold the injunction and remand for trial on the merits."[13] *Ashcroft*, 124 S. Ct. at 2791.

4. RFRA does not codify the result of any pre-RFRA decision.

The government claims that Congress "expects [RFRA] to be interpreted in conformity with" the outcomes of pre-RFRA controlled substance cases. (Br. 24–25 & n.13.) But RFRA "neither approves nor disapproves of the result in any particular court decision . . . . [It] is not a codification of any prior free

[12] Whether a particular interest is compelling is a legal question, *see United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002), but the question the district court resolved was the fact-specific inquiry of whether preventing UDV's religious use of *hoasca* actually *furthers* the government's interests in protecting health and safety and preventing diversion. (*See* Pet. App. 212a n.8.)

[13] The government is wrong to suggest that evidentiary equilibrium calls for a greater inquiry into the public consequences of an injunction (Br. 14), since the public consequences factor is just one of four that an equity court must consider when deciding whether to grant injunctive relief. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 392 (1981). Even if the government were correct, the interest in protecting free exercise of religion would be sufficient, as Congress determined it should be.

exercise decision but rather the restoration of the legal standard that was applied in those decisions." H.R. Rep. No. 103-88, at 7 (1993); *accord* S. Rep. No. 103-111, at 9 (1993).

Even if the Court were to conclude that Congress intended to codify the results of particular cases, the decisions the government cites are irrelevant. Many involved marijuana, which presents distinct health and enforcement problems not at issue here. *See, e.g., Olsen,* 878 F.2d at 1464 (agreeing with DEA's position that the "immensity of the marijuana control problem" and petitioner's desire to smoke marijuana "continually all day," rather than during a "traditional, precisely circumscribed ritual," warranted enforcement of CSA as against petitioner's religious use of marijuana where enforcement against type of limited, ritualized, use of peyote practiced by NAC was unwarranted). Others involved claimants whose beliefs were insincere or not religious. *See, e.g., United States v. Kuch*, 288 F. Supp. 439, 443–45 (D.D.C. 1968) (finding that Neo-American Church was not a religion).[14] Others were decided under the rational basis test of *Smith*, *see, e.g., Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1213 (5th Cir. 1991), or involved entirely different issues, *see, e.g., Kennedy v. Bureau of Narcotics & Dangerous Drugs*, 459 F.2d 415, 417 (9th Cir. 1972) (constitutional protection of religious use of peyote "not properly before" court); *Golden Eagle v. Johnson*, 493 F.2d 1179, 1183–85 (9th Cir. 1974) (special procedures not required for seizure of religious peyote); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) (no First Amendment challenge to tribal law criminalizing peyote).

Because the government has not proved that UDV's use of *hoasca* would cause any enforcement problems, because the government conceded that UDV is a valid religion, and because *Smith's* rational-basis analysis does not apply under RFRA

[14] One of the church's official songs was "Puff, the Magic Dragon" and its bulletin was entitled "Divine Toad Sweat." *Kuch*, 288 F. Supp. at 444.

these cases do not support the government's position. To the contrary, these cases prove that courts are "quite capable . . . of strik[ing] sensible balances between religious liberty and competing state interests" on a case-by-case basis. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).

B. UDV's sacramental use of hoasca *does not violate the 1971 Convention.*

The government claims the preliminary injunction requires it to violate the 1971 Convention and that the government has a compelling interest in compliance. This is wrong because (1) the district court correctly found that *hoasca* is not covered by the Convention; and (2) even if the Convention otherwise applied, the language of the Convention itself and of other treaties to which the United States is a party permit the government to accommodate UDV's religion. Furthermore, the government made no effort to prove a treaty-related compelling interest in prohibiting UDV's exercise of religion.

1. The 1971 Convention does not apply to *hoasca*.

The district court correctly found "that the 1971 Convention on Psychotropic Substances does not apply to the hoasca tea used by the UDV" (Pet. App. 242a), since the 1971 Convention does not apply to plants or to decoctions, infusions, or beverages made from them. The government disagrees, pinning its entire argument on one decontextualized phrase of the 1971 Convention: "a preparation is subject to the same measures of control as the psychotropic substance which it contains." (Br. 41–42.) The government claims that the word "preparation" includes *hoasca* because *hoasca* contains DMT, which is prohibited by the 1971 Convention. As demonstrated below, however, DMT is *only* prohibited when it is or has been isolated as a distinct chemical, not when it is naturally present in a tea made from plants. The text of the Convention, its drafting history, the *1971 Commentary*, the 1988 Convention, the conduct of the United States regarding the export and use of peyote for religious purposes, the opinion of the executive

secretary to the International Narcotics Control Board (INCB) (which administers drug treaties), and the statement of a former member of the INCB establish that *hoasca* is not a "preparation" within the terms of the Convention and is not covered. Because neither of the plants used in making *hoasca* is covered by the Convention, and because DMT, which *is* covered, is not extracted, distilled, separated, or added as a distinct chemical substance in preparing *hoasca*, *hoasca* is not a "preparation."

The terminology of the treaty and related documents reflect its underlying policies. *Hoasca* is made by boiling two plants in water—a traditional, uncomplicated and unsophisticated process unrelated to refining or creating street drugs. The 1988 Convention illustrates why such mixtures are not covered: All actions taken in upholding the drug conventions "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use." 1988 Convention, art. 14(2). The 1988 Convention thus evidences the desire to protect traditional practices, including UDV's *hoasca* use. UDV has existed as a legal entity since 1961 (J.A. 50), and the plants have been used religiously for thousands of years (J.A. 78, 342).

This is reflected in the Conventions and related documents. First, by its terms, the 1971 Convention does not apply to plants, since no plants or parts of plants are listed in any of its Schedules.[15] The *1971 Commentary* states that:

> Plants as such are not, and—it is submitted—are also not likely to be, listed in Schedule I, but only some products obtained from plants. Article 7 therefore does not apply to plants as such from which substances in Schedule I may be obtain nor does any other provision of the [1971]

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[15] The 1971 Convention's explicit declination of applicability to *any* plants or parts of plants is a major change from the Single Convention on Narcotic Drugs, *done*, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (1961 Convention), which expressly prohibits the cultivation of coca bushes, opium poppies, cannabis plants, and parts of those plants.

> Convention. Moreover, the cultivation of plants from which psychotropic substances may be obtained is not controlled by the [1971] Convention.

(Resp't Opp. App. 55.)[16] Commentaries are accepted aids to treaty interpretation. *See Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) ("[W]e have traditionally considered as aids to its interpretation negotiating and drafting history (*travaux preparatoires*) and the postratification understanding of the contracting parties.") (internal citation omitted).

The government, however, claims that *hoasca* would be legal only if the United States had reserved for it when it ratified the 1971 Convention. (Br. 46–47.) But "the continued toleration of the use of hallucinogenic substances which the 1971 Conference had in mind *would not require a reservation* under paragraph 4 of Article 32," which, in case they are banned *in future*, allows countries to make reservations for certain plants traditionally used by particular religious groups.[17] (Resp't Opp. App. 58.) Just as plants are not covered by the convention and do not require a reservation, neither are infusions or beverages made from them. Paragraph 12 of the *1971 Commentary* to Article 32 points out:

> Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which

[16] The *1971 Commentary* refers to the 1971 Convention as the "Vienna Convention." *See 1971 Commentary* vii. We have substituted "1971" to maintain consistency within this brief.

[17] The United States reserved for the use of peyote by NAC in the event peyote might be included in the treaty at some future time. *See* S. Exec. Rep. No. 96-29, Convention on Psychotropic Substances at 4 (1980) ("Since mescaline, a derivative of the peyote cactus, is included in Schedule I of the Convention, and since the inclusion of peyote itself as an hallucinogenic substance is possible in the future, . . . the instrument of ratification include[s] a reservation with respect to peyote harvested and distributed for use by the Native American Church in its religious rites."); (*see also* Pet. App. 240a.)

> constitute the active principles contained in them. The inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle...Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant *Mimosa hostilis* [n.1227 "*An infusion of the roots is used*"] nor Psilocybe mushrooms [n.1228 *"Beverages made from such mushrooms are used."*] themselves are included in Schedule I, but only their respective active principles, mescaline, DMT, and psilocybine (psilocine, psilotsin).

(Resp't Opp. App. 58) (emphasis added). The *1971 Commentary*'s footnotes, quoted verbatim in the text above, again show that *hoasca* is not covered. Out of the thousands of plant species that contain psychotropic alkaloids, one of the *Commentary*'s two examples of what the 1971 Convention *does not* prohibit is "an infusion of the roots" of "*mimosa hostilis,*" a plant from Brazil that, like *psychotria viridis,* contains DMT, and has been used to make a religious tea. (J.A. 357.) No logical reason exists to assume that similar infusions made from other unregulated plants, such as *psychotria viridis* and *banisteriopsis caapi*, the components of *hoasca*, would be treated differently.[18] A tea, of course, is created by infusion. *See Kendall Co. v. Tetley Tea Co.*, 189 F.2d 558, 560 (1st Cir. 1951) (tea bag is constructed to allow rapid infusion of tea).

The government's insistence that *hoasca* must be seen as a "preparation" and therefore must be covered is simply incorrect. Article 1(f) of the 1971 Convention defines "preparation" as "any solution or mixture, in whatever physical state, containing one or more psychotropic substances."

[18] During a drafting plenary session, the Canadian representative noted that the Convention relates "only to chemical substances and not to natural materials." United Nations Conference for the Adoption of a Protocol on Psychotropic Substances, Official Records, vol. II, Vienna, Jan. 11–Feb. 19, 1971, Twenty-Fifth Plenary Meeting, ¶ 45 (statement of Canadian Representative, Mr. Chapman), U.N. Doc. E/CONF. 58/7/Add. 1 (1973).

However, the portion of the *1971 Commentary* quoted above, with its footnotes, excepts from "preparation" infusions and beverages made from plants. If any doubt remained about this, paragraph 3.18 of the *1988 Commentary* makes it clearer still. It defines "preparation" as "*the mixing of a . . . drug with one or more other substances* (buffers, diluents)." (Resp't Opp. App. 66) (emphasis added). UDV does not obtain DMT from any source, or mix it with buffers or diluents. It makes a traditional tea from plants, by infusing them in boiling water, and the resulting decoction is not covered.

Other interpretive evidence supports the conclusion that the 1971 Convention does not cover *hoasca*. During the evidentiary hearing, UDV offered the written opinion of Mr. Herbert Schaepe, the executive secretary of the INCB, which he sent to the Ministry of Health of the Netherlands in response to a specific request regarding the legal status under the 1971 Convention of a similar tea used by a different religious group in the Netherlands. (Resp't Opp. App. 51–52.) Mr. Schaepe's opinion was clear: "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention." (*Id.*)

The government objected to this evidence, arguing that because it related to the Convention, it was "for another day." (J.A. 769.) Although the district court initially excluded the evidence, it eventually found, based on the analysis described earlier, that the 1971 Convention did not include UDV's sacramental *hoasca* tea because it is made by boiling the parts of two plants and does not involve a chemical or physical separation of DMT. (Pet. App. 242a.) The district court relied on the 1971 Convention itself, the *1971 Commentary*, the statements of Congress that plants are not covered by the treaty but may be included in the future, and evidence that peyote is exported to Canada even though peyote contains mescaline,

which is controlled under the Convention, and which the United States did not reserve to export. (Pet. App. 241a.)[19]

After the district court granted the preliminary injunction, the government sought a stay and, in support, submitted a declaration from a State Department lawyer. (J.A. 15.) The district court denied the stay, finding the declaration was only the State Department's litigation position. (Resp't Opp. App. 4.) The district court found that the INCB executive secretary's letter (*Id.* at 51–52) provided additional support for the conclusion that the Convention did not control *hoasca* (*id.* at 4). Accordingly, by the time the government took its appeal, the district court had before it the commentaries, the Senate Report regarding the reservation for peyote, the United States's practices in relation to peyote, and the letter from INCB Secretary Schaepe.

When the government sought a stay from the court of appeals, it submitted two more declarations from State Department lawyers and one from the DEA. (*See* J.A. 1; Pet. App. 261–71.) In response, UDV submitted the declaration of Ambassador Herbert Okun, an American diplomat who was a member of the INCB for over ten years. (Resp't Opp. App. 48.) Ambassador Okun confirmed that the Convention does not cover *hoasca*, explaining that the *1971 Commentary* "is the principal written instruction" regarding the interpretation of the Convention and is "an official document" that "provides authoritative guidance to Parties in meeting their obligations under the Conventions, consistent with national laws and policies." (*Id.*)

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[19] Although the government now claims it did not condone this exportation, (Br. 43 n.31) the Index and Mailing List of the Texas Department of Public Safety, listing the Canadian churches authorized to receive peyote from the peyote fields in Texas, was a government exhibit (J.A. 105–15). Peyote does not grow in Canada and therefore, like *hoasca*, must be imported. There is no evidence that, during nearly forty years of this practice, any treaty signatories have complained or that the United States's "leadership" role has suffered. (Br. 46.)

While the government now finally acknowledges that "the Commentary . . . protects a plant substance" such as *hoasca*, "if it is 'clearly distinct from the substance constituting its active principle'" (Br. 42), it completely changes the facts by arguing that *hoasca* is "[m]ade by the *extraction* and *synthesis* of the active principle DMT with the active principle of another plant to create an oral delivery system for DMT that activates its hallucinogenic properties, [so] hoasca is not 'distinct' from the regulated DMT." (Br. 42) (emphasis added). *No citation appears for this statement because there is none. The statement is patently false.* No evidence exists that DMT is separately extracted[20] or synthesized,[21] nor could such evidence exist because that is *not* how this sacramental tea is made. (J.A. 529.)

The government also misrepresents the evidence when it cites to the panel decision to support its assertion that "ingestion of the chemicals *distilled* by the brewing process allows DMT to reach the brain." (Br. 5) (emphasis added). Nothing is "distilled"[22] when the two plants are boiled together, nor did the panel say so.[23] The process of making *hoasca* tea from the bark of the *banisteriopsis caapi* and the leaves of *psychotria viridis* does *not* entail any chemical separation of

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[20] The *1988 Commentary* defines extraction as "the separation and collection of one or more substances from a mixture by whatever means: physical, chemical or a combination thereof." (Resp't App. Opp. 65.)

[21] *Hawley's Condensed Chemical Dictionary* 161 (13th ed. 1997), defines synthesis as "[c]reation of a substance that either duplicates a natural product or is a unique material not found in nature, by means of one or more chemical reactions. . . ."

[22] *Hawley's Condensed Chemical Dictionary* 418–19 (13th ed. 1997), defines distillation as "[a] separation process in which a liquid is converted to vapor and the vapor then condensed to a liquid."

[23] Contrary to the government's assertion, the correct citation to the panel decision is that "[i]ngestion of the *combination of plants* allows DMT to reach the brain." (Pet. App. 127a) (emphasis added).

any psychotropic substances from the plants.[24]

If simply boiling the plant substances with water were an "extraction" that rendered the tea not "clearly distinct" from its active principle, the Convention would also require the United States to forbid NAC's sacramental peyote tea, because the United States took no reservation for the active principle, mescaline. Government exhibits and expert testimony established that NAC uses peyote as a sacrament by eating the buttons of the plant and by making a tea (J.A. 501, 925, 944) from parts of the plant containing mescaline, which is listed in Schedule I of the Convention. If the treaty applies to a tea from *psychotria viridis*, a non-covered plant that contains DMT (a covered chemical), it must also apply to peyote, a non-covered plant that contains mescaline (a covered chemical). But, just as *hoasca* tea is clearly distinct from DMT, peyote tea is clearly distinct from mescaline.[25]

Notwithstanding the text of the two conventions and their official commentaries, the government continues to argue that the district court should have deferred to the government's lawyer's contrary interpretation.[26] Courts, however, first look

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[24] Moreover, expert evidence established that extraction of the DMT alkaloid alone from the other alkaloids in the plants would involve a very difficult, time-consuming, and expensive chemical process. (J.A. 353–54.) It would also not yield a substance of any sacramental interest to UDV because it is the plants that are sacred. (J.A. 317, 541.)

[25] The government's unsupported and specious comparison to marijuana tea (Br. 42) is merely inflammatory rhetoric. Unlike *pyschotria viridis*, the *plant* marijuana and the leaves of the marijuana plant are specifically prohibited in Schedule I of the CSA and the 1961 Convention.

[26] One court noted the government's frequent inconsistency regarding commentaries to treaties: "For all of its efforts to downplay the persuasive value of the commentary when invoked by [the opposing party], the government itself has cited to the Commentary when favorable to its position." *United States v. Noriega*, 808 F. Supp. 791, 795 n.6 (S.D. Fla. 1992) (regarding commentary to the Geneva Convention). In its statement of policy in Rescheduling of Synthetic Dronabinol, 51 Fed. Reg. 17,476

to the language of a treaty for its interpretation. *See Olympic Airways v. Husain*, 540 U.S. 644, 649 (2004). It is also appropriate for courts to "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. 392, 396 (1985); *see, e.g., El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 172–74 (1999) (citing statements made by delegates to the Warsaw Conference and the differences among the various drafts of the convention); *Zicherman*, 516 U.S. at 226–27 (citing committee reports). In this case, the Convention unambiguously does *not* cover *hoasca*, notwithstanding the one passage, taken out of context, on which the government attempts to focus this Court's attention.

The Executive Department's official positions regarding treaty interpretation are entitled to great, but not conclusive, weight, "provided they are not inconsistent with or outside the scope of the treaty" or do not conflict with the interpretation by another signatory to the treaty. *Air Canada v. U.S. Dep't of Transp.*, 843 F.2d 1483, 1487 (D.C. Cir. 1988).[27] A litigation position taken by the Executive, however, is not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (explaining that the Court has never accorded deference to the Executive's "litigating positions that are wholly unsupported by regulations, rulings, or [prior] administrative practice"). Here, first, the district court found correctly that the government's declarations reflected only the government's litigation position. (Resp't Opp. App. 4.)

(May 13, 1986), relating to a controlled substance under the 1971 Convention, the DEA stated that the *Commentary* "provides guidance to parties in meeting [their] obligation [under the Convention]." *Id.* at 17,477.

[27] *See also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 133–34 (1989) (rejecting the interpretation of the treaty set forth by the United States as amicus curiae); *Perkins v. Elg*, 307 U.S. 325, 328, 337, 342 (1939) (declining to adopt Executive's treaty interpretation).

Second, the government's interpretation, for the reasons set forth above, conflicts with the text of the Conventions and their stated purpose of protecting traditional religious uses, and conflicts with the official commentaries and authoritative interpretations. Third, as the Schaepe letter shows, the Executive's litigation position in this case is in conflict with the official position of the INCB, the Conventions' principal authority, and at least two treaty partners, France (Resp't Opp. App. 48, 67–97) and Brazil (Pet. App. 126a–27a; J.A. 766, 890, 903).[28]

Ambassador Okun's opinion, affirming the position stated in the INCB executive secretary's letter—that the Convention does *not* cover preparations like *hoasca*—undeniably carries more weight than the speculative testimony of a State Department lawyer, which cannot satisfy RFRA. (*See* Pet. App. 107a) (McConnell, J., concurring) ("[W]hile some level of deference to Congressional and Executive findings is appropriate in the context of foreign relations, this affidavit does not provide any information specific enough to be relevant in assessing the damage that would flow from an exemption for the UDV.").

Moreover, that the INCB executive secretary and the former American member of the agency in charge of monitoring and implementing the Convention interpret the 1971 Convention as inapplicable to *hoasca* fatally undercuts the government's argument that the United States's "leadership" role (Br. 46) will

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[28] The cases cited in support of the government's claim that the political branches have long exercised plenary control over what may enter this country's borders (Br. 45 n.33) stand for nothing more than the unremarkable proposition that Congress has plenary power over foreign commerce, subject to constitutional limitations. *See, e.g., Brolan v. United States*, 236 U.S. 216, 218 (1915) ("The power to regulate commerce with foreign nations is expressly conferred upon Congress . . . acknowledging no limitations other than those prescribed in the Constitution."). It follows that Congress, through RFRA, may modify its own statutory enactments relating to the importation of particular goods.

be jeopardized if it ignores its supposed treaty obligations.[29] As Judge McConnell aptly noted:

> Presumably that lawyer [for the State Department] did not mean to say that all violations, from the smallest infraction to blatant disregard for the treaty as a whole, are equally damaging to the diplomatic interests of the United States. He made no mention of whether the International Narcotics Control Board deems hoasca to be within the Convention or whether there may be ways to comply with the Convention without a total ban.[30]

2. The 1971 Convention must defer to RFRA.

The government invokes *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), to argue that this Court should conform the interpretation of RFRA with the

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[29] Although the government asserts, through non-record hearsay evidence attached to its opening brief, that Brazil forbids the export of *hoasca*, this is contrary to the record evidence that Brazil does not control *hoasca*. (Pet. App. 126a–27a; J.A. 766, 890, 903.) Furthermore, after the Brazilian police officer wrote the letters attached to the government's brief, DEA and Brazilian authorities coordinated the fourth internationally licensed shipment of *hoasca* from Brazil to UDV in compliance with the preliminary injunction, both parties having full knowledge that the *hoasca* contains DMT. UDV is prepared to prove these non-record facts at trial and state them here only because they are necessary in response to the government's non-record evidence.

[30] Other treaty partners have successfully accommodated the treaty and domestic law. For example, "Dutch enforcement guidelines . . . indicate that 'possession of less than 30 grams of cannabis products [is] placed on the lowest priority level, meaning that no active criminal investigation or prosecution [is] undertaken.'" Taylor W. French, Note: *Free Trade and Illegal Drugs: Will NAFTA Transform the United States into the Netherlands?* 38 Vand. J. Transnat'l L. 501, 516 (2005); *see also id.* at 519 ("The [Swiss] government provides the heroin as well as the needles needed for injection in an effort to prevent addicts from acquiring diseases or resorting to crime to find their drugs."). Brazil has accommodated religious *hoasca* use for many years (*see* Pet. App. 126a–27a; J.A. 164, 766, 890, 903) without complaint by any treaty partners.

government's interpretation of the 1971 Convention. (Br. 41.) *Charming Betsy* holds that "an act of Congress ought never be construed to violate the law of nations if any other possible construction remains." This principle is not implicated here, however, for a variety of reasons. First, it applies only where the statute is ambiguous, *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir. 2001), and the government does not claim that RFRA, which applies to "all Federal law" is ambiguous, § 2000bb-3. Second, for the reasons set forth above, there is no tension between RFRA and the Convention. Third, even if a conflict did exist, it would be immaterial since RFRA is later in time. Both statutes and treaties are the supreme law of the land, *see Edye v. Robertson*, 112 U.S. 580, 598 (1884), and "when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null," *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion). Because the Convention is "subject to such acts as Congress may pass for its enforcement, modification, or repeal," *Edye*, 112 U.S. at 599, RFRA modifies the Convention to the extent it might be possible to interpret the treaty as applying to the religious use of *hoasca*.

Moreover, even if the Court were to decide that the 1971 Convention does apply to *hoasca*, but that RFRA requires a particular religious use to be excepted, the Convention itself anticipates and accommodates such exceptions. Its penal provisions do not "affect the principle that the offenses to which it refers shall be defined, prosecuted, and punished in conformity with the domestic law of a party." 1971 Convention, art. 22, para. 5. In other words, while the Convention requires signatory nations to criminalize the drugs listed in Schedule I, it also recognizes that each government has the right to ensure that any punishment imposed for use of illegal drugs will comport with its domestic laws. Therefore, even if the Convention did cover *hoasca*, the United States would remain in compliance so long as it continued to prohibit

the use of DMT, even if a court order pursuant to RFRA required the government to make an exception for UDV's religious use. The same applies to Brazil, of course, negating the assertion of Brazilian police officer Urbano that the export of *hoasca*, for religious use, would be illegal in Brazil. Indeed, Brazil "recognizes the judicial legitimacy of the religious use of ayahuasca." (Br. 13a.)

3. The government fails to acknowledge its responsibilities under other treaties.

The government focuses on the 1971 Convention as if it were the only treaty to which the United States is a party, but the United States must uphold other treaties it has signed. "[E]ven if the Convention does apply to *hoasca*, the United States has obligations under its laws and other international treaties to protect religious freedom. . . . 'The freedom to manifest religion . . . in worship, observance, practice and teaching encompasses a broad range of acts . . . ' U.N. Hum. Rts. Comm., General Comment No. 22, at 4 (1993)." (Pet. App. 146a.) The United States is a signatory to the United Nations International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 16, 1996, 999 U.N.T.S. 171, which ensures the freedom of everyone to "have or to adopt a religion of his choice, and freedom, either individually or in the community of others and in public or private, to *manifest his religion* or belief in worship, observance, *practice*, and teaching." (Emphasis added); *see* 138 Cong. Rec. S4781 (daily ed. Apr. 2, 1992) (Senate ratification). If the government forbids UDV and its members to practice their religion, without any compelling need to do so, it should be concerned about the reaction of the 144 parties to the ICCPR.[31]

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[31] Congress also passed the International Religious Freedom Act of 1998 (IRFA), 22 U.S.C. §§ 6401–6481 (2000), finding that the "right to freedom of religion undergirds the very origin and existence of the United States," *id.* at § 6401(1) and establishing as United States foreign policy the promotion of freedom of religion abroad.

4. The government did not prove that it has a compelling interest in adhering to the supposed requirements of the 1971 Convention.

The court of appeals found that the government did not meet its compelling interest/least restrictive means burden under RFRA as regards to the treaty. (Pet. App. 5a.) Because all laws—including treaties—must be analyzed in light of RFRA, §2000bb-3(a), the government must "build a record," *see id.*; (Pet. App. 142a), by introducing "'specific evidence' of the interests advanced and how accommodation would affect them," *Hardman*, 297 F.3d at 1127, 1130; (*see also* Pet. App. 142a). The government failed to do so here.

Instead, the government claimed at the hearing that the treaty issue was "for another day." (J.A. 769.) Now it has asserted that violation of a treaty is a compelling interest *per se*. However,

> RFRA places the burden on the government to demonstrate that application of the law to the particular religious exercise is the least restrictive means of furthering its interest. . . . [T]he government has undertaken no steps to inquire regarding the status of *hoasca* or to work with the Economic and Social Council or the International Narcotics Control Board to find an acceptable accommodation. Rather, it has posited an unrealistically rigid interpretation of the Convention, attributed that interpretation to the United Nations, and then pointed to the United Nations as its excuse for not even making an effort to find a less restrictive approach.

(Pet. App. 106a.) (McConnell, J., concurring)

In addition, "the fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis." *Boos v. Barry*, 485 U.S. 312, 324 (1988); *see also Hardman*, 297 F.3d. at 1129 n.19 ("The government has not shown that fulfillment of treaty obligations is a compelling interest."). Furthermore, "a Government policy interest is not 'compelling'

within the meaning of RFRA just because Government says it is. That would permit . . . Government to opt out of RFRA at will." Michael Stokes Paulsen, *A RFRA Runs through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 254 (1995). It would also allow the government to circumvent RFRA's requirement that the government "build[] a record." *Hardman*, 297 F.3d at 1130.

C. Uniform application of the CSA is not a compelling interest.

After failing to persuade the district court that it had a compelling interest, failing to submit any evidence that it had adopted the least restrictive means, and failing to appeal the district court's findings as clearly erroneous, the government tries a new tactic here. It asserts that the district court erred by finding no compelling interests in the uniform application of the CSA to prevent a host of meritless claims for religious exemptions. (*See* Br. 14, 19–23.) Notwithstanding RFRA's explicit burden of proof requirement, the government argues that this Court should presume that the government has a compelling interest in the uniform application of the CSA and presume that, unless this Court reverses the district court's decision, others will assert unwarranted claims for religious exemptions from the CSA that federal courts will be ill equipped to evaluate on their individual facts. The government's reliance on *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483 (2001) and *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) is misplaced. Those cases involved medical uses of marijuana, and their analyses hinged on the Commerce Clause and statutory interpretation, not RFRA's strict scrutiny. *See Raich*, 125 S. Ct. at 2204–05; *Oakland Cannabis*, 532 U.S. at 490–94.

The Court should not consider the government's uniform application theory because the government did not raise this in the district court and therefore never adduced any evidence to prove that it actually had any such compelling interest. Instead,

it asserted the theory for the first time in the court of appeals. (Pet. App. 150a.) Although UDV objected, the court of appeals panel treated "uniform application of the CSA" as subsumed within the interests asserted in the district court, but did not directly address it as a separate claimed interest. (*Id.* at 151a.) Of the thirteen judges sitting in the en banc court, only four dissenting judges acknowledged or endorsed the "uniform application" theory, and no member of the court of appeals endorsed the "slippery-slope" aspect of the theory. Before this Court, the government has moved its uniform application theory to center stage, peppering its brief with factual allegations that either lack support in the record, are based on snippets of evidence the district court rejected, or rest on hearsay evidence the government is attempting to introduce for the first time in this Court. (*See* Mtn. to Strike, 7/14/05); discussion *supra* pp. 5–9.[32]

The government could present such evidence at trial, but it has resisted all efforts to try this case. (Resp't Opp. App. 40–45.) The rule against considering issues not raised in the district court is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v.*

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[32] In asking this Court to excuse it from its burden of proof, the government invokes this Court's previous statements regarding the perniciousness of "the drug trade." (*See* Br.16, 18) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (problems associated with criminal drug trade), *Harmelin v. Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part) (violence and crime associated with drug trade), and *United States v. Mendenhall*, 446 U.S. 554, 562 (1980) (difficulties in detecting enormously profitable, easily concealed, deadly drugs such as heroin)). It is a measure of the poverty of the government's legal arguments and its lack of understanding of sincere religious exercise that it equates the facts in the cited cases with UDV's use of *hoasca*.

Helvering, 312 U.S. 552, 556 (1941); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (when argument raised for first time on appeal, "we have no idea what evidence, if any, petitioner would, or could, offer in defense [of the argument]").

The government's uniform application argument is also wrong for four substantive reasons. First, to hold that uniform application of the CSA is a compelling governmental interest *per se*, the Court must rewrite RFRA by placing the CSA beyond its reach. It is not for the courts to decide whether the CSA should be insulated from RFRA because Congress has decided that RFRA applies "to all Federal law," § 2000bb-3(a), including the CSA. "[C]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. Comm'r*, 464 U.S. 386, 398 (1984); *see also Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.").

Second, this Court's decisions provide no support for the government's uniform application argument. For example, in *Hernandez v. Commissioner*, 490 U.S. 680 (1989), on which the government relies (Br. 20 n.8), the issue was whether granting a religion-based exemption from federal tax laws would jeopardize the integrity of the federal tax system by opening the door to similar exemptions. By contrast, the government can continue to effectively use the CSA to combat illicit drug use while permitting UDV to consume *hoasca* in its religious ceremonies. The longstanding and "successful" (Br. 27) peyote exemption has not undermined, or even affected, the government's efforts to prevent drug abuse. No evidence exists that the government's experience with UDV will differ.[33]

[33] The government's other authorities are also inapposite. Congress superceded *Goldman v. Weinberger*, 475 U.S. 503 (1986) with 10 U.S.C. § 774 (2000), which is further evidence that Congress intends as much latitude for religious practices as possible, even in the context of the military.

Third, even if uniform application of some drug laws could be a compelling interest, the CSA, as it relates to religion, is *not* uniformly applied. The CSA's prohibition on distribution and possession of peyote and the mescaline it contains does not apply to the members of Indian tribes, 42 U.S.C. § 1996a(b)(1), or to the members of NAC, 21 C.F.R. § 1307.31. Both the statute and the regulation draw a clear distinction between illicit use of peyote, which is prohibited, and "nondrug use of peyote in bona fide religious ceremonies," 21 C.F.R. § 1307.31, which is not prohibited. That distinction reflects a determination by Congress and the DEA that *context matters* when it comes to the need to prohibit the use of Schedule I controlled substances.[34] RFRA directs courts to make fact-specific determinations about whether the context permits a religious exemption from the CSA.

Because the government exempted some ceremonial drug use, its drug control scheme is unlike the Oregon scheme in *Smith*. Unlike the government, Oregon did not recognize any religion-based exemption from its drug laws because of its "judgment that the possession and use of controlled substances, *even by only one person*, is inherently harmful and dangerous." *Smith*, 494 U.S. at 905 (O'Connor, J., concurring in the judgment) (emphasis added). Having created an exemption from the CSA for the religious use of a Schedule I controlled substance by hundreds of thousands (and now, under AIRFA, over a million) Americans, the government cannot complain that a similar exemption for a church with 130 members will undermine its interest in uniformly applying the CSA. "[T]he Government's asserted need for absolute uniformity is

[34] (J.A. 399–404, 500–07) (explaining differences between marijuana and peyote for purposes of assessing whether religious exemption is required).

contradicted by the Government's own exceptions to its rule." *Goldman*, 475 U.S. at 532 (O'Connor, J., dissenting).

Fourth, recognizing a narrow exemption for UDV based on the unique facts of this case will not inevitably lead to the creation of a large number of other religion-based exemptions from the CSA. RFRA requires a fact-specific determination about the merits of each claim, and it rests on a congressional determination that courts can and should distinguish between meritorious claims like UDV's and meritless claims. *See* § 2000bb(a)(5) ("[T]he compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."). Recognizing a religious exemption for UDV will merely confirm that RFRA means what it says—that the government must prove that burdening a particular person's religious exercise is the least restrictive means of furthering a compelling interest. An exemption for UDV will not control the outcome of any other case.[35] There is "no cause to believe" that federal courts are incapable of applying strict scrutiny to distinguish valid from invalid claims for religious accommodation. *Cutter*, 125 S. Ct. at 2123. The solicitor general recognized this during the *Cutter* oral argument when he responded to a question about whether strict scrutiny would open the floodgates to unacceptable

[35] The district court denied another group's motion for leave to participate in this case as amicus curiae because, inter alia, "the factual circumstances relating to the consumption of hoasca tea by members of [UDV], and the government's actions in regard to that use of hoasca, differ significantly from the facts involving the consumption of Daime tea by members of the Santo Daime Church, and the government's reaction to that use of Daime." (J.A. 102–04.) Additionally, none of the foreign arrests for ayahuasca the government mentions involved UDV. (Br. 48 & n.36.) As the district court noted, the government and Santo Daime can continue to negotiate. (J.A. 104.) Or they may try their disputes in an appropriate forum. The Santo Daime case should not be prejudged here on the basis of the government's unopposed assertions, nor should those assertions influence the Court's decision in this case.

religious exemptions for prisoners by arguing that the test "is not an entitlement to get your religious beer at 5:00 p.m. every day. It is a balancing test, and I think things like getting beer every day, getting marijuana inside prison walls would not satisfy the test." Transcript of Oral Argument at 6–7, *Cutter*, 125 S. Ct. 2113 (2005) (No. 03-9877).

Applying RFRA as Congress wrote it, courts will continue to deny religious exemptions to claimants like Rohi Israel, a narcotics abuser and "convicted felon on parole" who testified that his habit of smoking marijuana "all day every day" made it impossible for him to work and support his children.[36] *United States v. Israel*, 317 F.3d 768, 772–73 (7th Cir. 2003).

D. The record contains no evidence of least restrictive means.

Even if the Court were to conclude that the government proved that prohibiting UDV's sacramental *hoasca* furthers a compelling interest, the government did not prove that its prohibition is "the least restrictive means" of furthering any of those interests. § 2000bb-1(b)(2). Such proof is made by showing that "exempting [UDV] from the . . . general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.'" *Smith*, 494 U.S. at 905 (O'Connor, J. concurring in the judgment) (quoting *United States v. Lee*, 455 U.S. 252, 259 (1982)); *see supra* authorities cited at 14 (emphasizing that government must introduce specific evidence

[36] The government has not adduced any evidence to support the conclusion that UDV's exemption will result in an increased number of claims that would unduly burden the courts. Even if it had, "administrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude." *Bowen v. Roy*, 476 U.S. 693, 730–31 (1986) (O'Connor, J., dissenting in part and concurring in part); *cf. Bowen v. Gillard*, 483 U.S. 587, 628 (1987) (holding that if efficiency could justify infringement of a constitutional right, "its reach would be limitless, for it is probably more efficient in most cases for the government to operate without regard to the obstacles of the Constitution than to attend to them").

to prove compelling interest and least restrictive means).

The government successfully prevents drug trafficking in peyote by requiring those who distribute peyote to religious users to register. 21 C.F.R. § 1307.31. *Hoasca* is even less widely used, and even less well known, than peyote, and probably less likely to be diverted for nonreligious use. (J.A. 325–31.) Because the government has not shown why it could not further its interest in preventing the diversion of *hoasca* by imposing registration requirements similar to those it imposes for peyote, it has not proven that no less restrictive means are available for furthering its interest in preventing drug trafficking. *See Boos*, 485 U.S. at 329 (ordinance preventing picketing near foreign embassy was not least restrictive means of furthering government's interest in protecting dignity of foreign personnel when more narrowly drawn statute was available).

The government's claimed interest in the uniform application of the CSA can be interpreted in one of two ways: It may be an argument that, independent of its other interests, some compelling interest exists in uniformity itself. If so, this issue was not raised in the district court, and should not be addressed here. Or it may be a claim that an exemption for UDV would "unduly interfere with fulfillment" of the government's interests, *Smith*, 494 U.S. at 905 (O'Connor, J., concurring in the judgment), and that consequently, there are no less restrictive means of furthering them. If that is the case, for the reasons discussed above, the government has failed to prove that uniformity is necessary to further its interests.

III. THE LOWER COURTS CORRECTLY APPLIED RFRA'S BURDEN-SHIFTING REQUIREMENTS.

The government insists that the lower courts rashly and improperly enjoined the enforcement of the CSA. (Br.10.) This is simply untrue. The courts enforced RFRA by creating a narrow exception for a religion. *Mazurek v. Armstrong*, 520 U.S. 968 (1997), which the government cites for the

proposition that preliminary relief is disfavored when it enjoins enforcement of a federal law (Br. 14) is not relevant to this RFRA case. Unlike *Mazurek*, which involved a lower court's across-the-board injunction of a state law, this case involves a congressionally mandated narrow religious exemption to a generally applicable law.

The government also argues that the court of appeals erred by allocating the burden of proof in accordance with RFRA's burden-shifting provision when determining whether UDV had established a substantial likelihood of success on the merits.[37] (Br. 12–13.) That contention is contrary to both RFRA's plain language and *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004).

RFRA's allocation of the burden of proof applies at every stage of every case. Had Congress intended to relieve the government of its statutory burden for the purpose of assessing a RFRA claimant's likelihood of success on the merits at the preliminary injunction stage, Congress could have done so. But RFRA does not suggest that the allocation of the burden depends on the type or permanence of the relief sought.

In accordance with RFRA's plain language, courts assessing a RFRA claimant's likelihood of success on the merits uniformly shift the burden of proof to the defendant once the claimant makes a prima facie case. *Kikumura*, 242 F.3d at 961–62 (Murphy, J.) (holding, in the context of reviewing the denial of a preliminary injunction, that "[o]nce a plaintiff establishes a prima facie claim under RFRA, the burden shifts to the government"); *Yahweh v. U.S. Parole Comm'n*, 158 F. Supp. 2d 1332, 1345–50 (S.D. Fla. 2001) (same); *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (same); *Campos v. Coughlin*, 854 F. Supp. 194, 207–08 (S.D.N.Y.

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[37] The court of appeals reheard this case en banc "to review the different standards by which [it] evaluate[s] the grant of preliminary injunctions, and to decide how those standards should be applied in this case." (Pet. App. 2a–3a.) The government does not contend in this Court that the court of appeals applied an erroneous preliminary injunction standard.

1994) (same); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 849 F. Supp. 77, 79 (D.D.C. 1994) (same). Here, the lower courts followed that well-worn path when assessing UDV's likelihood of success on the merits.

Ashcroft confirms that the lower court's approach was correct. In *Ashcroft*, the issue was whether the court of appeals correctly affirmed a preliminary order enjoining the enforcement of a federal criminal statute. The Court explained that the content-based criminal prohibition must "be presumed invalid" and required "the Government [to] bear the burden of showing [its] constitutionality." *Ashcroft*, 124 S. Ct. at 2788. *Ashcroft* teaches that where, as here, "the Government bears the burden of proof on the ultimate question," the movant "must be deemed likely to prevail unless the Government" carries its burden at the preliminary injunction stage. *Id.* at 2791–92.

The government faults the court of appeals for relying on *Ashcroft*, arguing that the placement of the burden on the government in *Ashcroft* was a "special procedural rule[]" founded on the presumptive invalidity of the content-based prohibition on speech at issue there. (Br. 13.) But *Ashcroft* simply requires each party to bear the same burden with respect to the likelihood-of-success-on-the-merits inquiry at the preliminary injunction stage that it must eventually bear on the merits. *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 388 (Fed. Cir. 1987) (holding that a party's entitlement to a preliminary injunction "is determined in the context of the presumptions and burdens that would inhere at trial on the merits"), *overruled on other grounds by Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 977–79 (Fed. Cir. 1995). That commonsense approach is not unique. To accurately predict the likelihood that *any* type of claim will succeed on the merits, a court must apply the same burdens at the preliminary injunction stage that the law requires it to apply when making a final judgment on the merits. *See, e.g., FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004) (civil contempt); *In re Aimster Copyright Litig.*, 334 F.3d 643, 652

(7th Cir. 2003) (Posner, J.) (copyright); *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1173–74 (11th Cir. 2002) (trademark); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 128–29 (4th Cir. 1999) (equal protection).[38] That is what *Ashcroft* prescribes and what the district court and court of appeals did here.

Even if the Court were to conclude that *Ashcroft* applies only to motions to enjoin government actions that are strictly scrutinized and therefore presumptively invalid, the court of appeals was correct to apply *Ashcroft* here. RFRA mandates strict scrutiny of all government action that substantially burdens religious exercise, §2000bb-1(b), which means that courts must deem all such action "presumptively invalid." *Smith*, 494 U.S. at 888; *see also City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (RFRA "require[s] searching judicial scrutiny . . . with the attendant likelihood of invalidation.").

In the government's backward view, it does not bear the burden at the preliminary injunction stage of overcoming the presumption of invalidity Congress has attached to government action that substantially burdens religious exercise. Instead, according to the government, the moving party must prove that

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[38] The government cites authority for the proposition that the movant bears the burden of disproving every affirmative defense raised (Br.12 n.4), but, as explained above, that is not the law. One of the government's own cases confirms that "entitlement to [a] preliminary injunction is determined in the context of presumptions and burdens that inhere at trial on the merits." *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 837 (Fed. Cir. 1992) (internal quotation marks and citation omitted). The government's other authorities are merely examples of the hesitancy of appellate courts to overturn decisions regarding preliminary injunctive relief where, as here, those decisions hinge on factual determinations. *See, e.g., Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25, 27 (1st Cir. 1993) (Breyer, C.J.) (denial of preliminary injunction not abuse of discretion because district court could have "reasonably want[ed] to see more evidence—insisting that the plaintiff make a somewhat stronger, more specific showing of a likely violation of law, including a probability of overcoming what the evidence now shows as plausible defenses").

the challenged government action *does not* further a compelling government interest by the least restrictive means. However, as Congress, this Court, and lower courts have recognized, RFRA does not operate in this backward way. Where, as here, the government substantially burdens religious exercise without proving that the burden is the least restrictive means of furthering a compelling interest, a court must grant preliminary injunctive relief to prevent the government from burdening the religious practice pending a final judgment. In this case, where the government unjustifiably used the threat of criminal prosecution to prohibit the UDV religion, it took more than five years in court before UDV could again hold its services.

CONCLUSION

The Court should affirm and remand this case to the district court for a trial on the merits.

Respectfully submitted,

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